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Supreme Court of the United States

No. 818—OCTOBER TERM, 1943

THE CITY OF NEW YORK,

Petitioner,

against

THE NATIONAL CITY BANK OF NEW YORK.

BRIEF OF RESPONDENT, THE NATIONAL CITY BANK OF NEW YORK, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BERNARD L. BERMANT,
Counsel for The National City Bank of New York,
270 Broadway,
New York 7, N. Y.

April 14, 1944.

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BRIEF OF RESPONDENT, THE NATIONAL CITY BANK OF NEW YORK, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The City of New York has petitioned this Court for the issuance of a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review an order of that Court entered December 30, 1943, reversing an order of the United States District Court for the Eastern District of New York which denied an application by The National City Bank of New York in this condemnation proceeding entitled: "United States of America vs. 53¼ acres of land, more or less, in the Borough of Brooklyn, County of Kings, State of New York, for the extension of the United States Navy Yard, New York, New York, et al., defendants", for an allocation to it, for an advance payment, on account of the just compensation owing to it.

The application, made pursuant to tit. 40, U. S. C., Sec. 258a, sought (1) for permission to deposit with the District Court Clerk to the credit of the City the sum of $508.41 representing a tender theretofore made by the bank to the City; (2) in the alternative that an equal sum be deducted from the advance payment applied for; and (3) for an order directing the Clerk to allocate to it out of the

$4,000,000 deposited by the Federal Government in the registry of the Court on the filing of a declaration of taking pursuant to tit. 40, U. S. C., Sec. 258a, a sum of money representing a fair, just and reasonable payment on account of the just compensation to be awarded to it in the proceeding (R. 5-14).

The Circuit Court of Appeals in reversing the order of the District Court denying the bank's motion, in its opinion, decided December 9, 1943 (139 F. [2d] 244) (R. 49-54) remanded the matter to the District Court for further proceedings. The opinion of the Circuit Court of Appeals by Swan, C. J., was concurred in by L. Hand, C. J., and Frank, C. J. The opinion of the District Court (Abruzzo, D. J.) is reported in 48 F. Supp. 764 (R. 29-36).

Jurisdiction

The order of reversal of the Circuit Court of Appeals was filed on December 30, 1943 (R. 56). The petition for writ of certiorari was filed on March 27, 1944, and served March 29, 1944. The jurisdiction of this Court is invoked by petitioner under U. S. Code, tit. 28, Sec. 347, subd. a.

Statutes Involved

New York Civil Practice Act, Secs. 1437, 1438, 1439 and 1440 are printed in the Appendix, *post,* pp. 37-39. This condemnation proceeding for an addition to the United States Navy Yard in Brooklyn, New York, was instituted under the United States Code, tit. 40, Secs. 257, 258 and 258a. By virtue of the provisions of Sec. 258, relating to the use of applicable state condemnation procedure in the Federal Courts, Sec. 2 of the Condemnation Law of the State of New York (Consol. Laws, Chap. 73) is also involved. See also Rule 81, subd. 7, of the United States Rules of Civil Procedure making inapplicable said rules to the trial of condemnation proceedings.

Statement of the Case

The opinion (R. 49-54) gives an accurate summary of most of the facts which will not here be repeated. One important fact stressed in the City's brief before the Circuit Court of Appeals should be pointed out. Prior to the vesting of title on April 1, 1941, on the filing of the declaration of taking and the deposit of $4,000,000 by the Federal government, when the City dispossessed, in summary proceedings, the bank's mortgagor, Hudes Bros., in November, 1940, the bank had not been made a party defendant. As events turned out its only remedy as mortgagee of the leasehold given by New York law was to redeem the lease on the only date set forth in the statute, to wit, November 25, 1941, a year and a day after the execution of the warrant dispossessing the tenant. But in March, 1941, as the City's brief below (pp. 5 and 6) makes clear,

> "It [the bank] first offered to pay all the arrears directly to the City. Upon the rejection of that offer, it made a motion in the Municipal Court to vacate the final order and warrant of dispossess, and to be impleaded as a party to the summary proceeding. It also asked permission to deposit all arrears in the Municipal Court. It further requested that the City's petition in the summary proceeding be dismissed, and that appellant [the bank] be allowed to foreclose its mortgage on the lease (fols. 52-53).
>
> "This motion was denied by the Appellate Term of the Supreme Court of the State of New York, Second Department, with a memorandum opinion in *Matter of City of New York* (*Hudes et al.*) 106 N. Y. Law Journal 103 (July 12, 1941). Appellant's [the bank's] application for leave to appeal from that order to the Appellate Division of the Supreme Court was denied, 106 N. Y. L. J. 722, Sept. 23, 1941 (fol. 55).
>
> "The next day (September 24, 1941), appellant's [bank's] attorneys served upon the Corporation Counsel a notice of intention to redeem in alleged compliance with the provisions of C. P. A. Sec. 1438 (fol. 56).

> That section prescribes the situation and the manner in which a mortgagee may redeem a lease theretofore terminated by dispossess proceeding founded on non-payment of rent."

The basis of the decision in the Appellate Term reversing the decision of the Municipal Court was that a mortgagee of a leasehold is not a necessary party in a summary dispossess proceeding. Therefore the bank immediately served a notice of intention to redeem within the statutory one-year period prescribed by C. P. A. Sec. 1438, and on the day specified by the statute, to wit, November 25, 1942, before 2 P. M. of that day, tendered the sum of money owed, $508.41 (R. 10) to protect its mortgage of $7,650 and interest (R. 7). As the Circuit Court of Appeals opinion indicates, the City does not question the correctness of the tender (R. 50-51).

The opinion of the District Court was predicated on the belief that an order of the Municipal Court obtained pursuant to the provisions of C. P. A. Sec. 1440 was essential before redemption could be effected, but the Circuit Court of Appeals held that (1) that ruling was contrary to the clear meaning of the statutory language, (2) was indicated to be erroneous in the Court of Appeals decision in *Terwilliger* v. *Browning King & Co.*, 222 N. Y. 47 (1917), wherein the provisions of Secs. 2256-2259 of the old New York Code of Civil Procedure (now Secs. 1437-1440 of the New York Civil Practice Act) were interpreted, and (3) in any event would have been futile since the order could not give the bank possession. The City in its petition for a writ of certiorari and its statement of the issues in its brief in this Court does not contend that one of the issues now involved is whether or not such an order was necessary to effect redemption. On the tender to the landlord under C. P. A. Secs. 1437 and 1438 the redemption was effected and the bank became entitled to "hold and enjoy the same according to the terms of the original demise".

The Issue

The question presented in the City's papers is whether or not a mortgagee of a leasehold, who, under the New York Law in the absence of a waiver of the right, had a right by following the statutory procedure, to redeem the leasehold a year and a day after the execution of the warrant of dispossess on the tenant's failure to redeem and thereupon "be entitled to the possession of the demised premises under the lease", and "hold and enjoy the same according to the terms of the original demise" (C. P. A. Sec. 1437), and who did redeem by tender to the City on November 25, 1941, the sum owed, has such a property right in the condemned lands as to entitle it to just compensation for the value of that property right in the lands taken by the condemnation on April 1, 1941.

POINT I

On the facts herein the City has not presented any grounds for the issuance of a writ of certiorari.

I

Under this Court's decisions, the determination of a question of title is governed by applicable local law. *Beauregard* v. *City of New Orleans*, 59 U. S. 497, 502 (1855); *Loundes* v. *Huntington*, 153 id. 1, 19 (1894).

In a recent condemnation case (*United States ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 63 Sup. Ct. 1047 [1943]), this Court in the course of its opinion said (p. 279):

> "Though the meaning of 'property' as used in Sec. 25 of the Act and in the Fifth Amendment is a federal question, it will normally obtain its content by reference to local law."

That the holder of such a right of redemption who thereafter redeems is entitled to compensation in a condemnation proceeding under New York law is clearly indicated by the tenor of the New York decisions cited by the Circuit Court of Appeals in its opinion and others hereinafter discussed in the following points.

II

However important this case may be to the parties involved, it involves "no question of public interest and general importance, nor any conflict between those of Federal courts of different circuits" (*Hamilton Shoe Co.* v. *Wolf Brothers*, 240 U. S. 251, 258 [1916]); nor is the decision "probably untenable", nor is it "probably in conflict with the State law as yet unannounced by the highest court of the State" (*Ruhlin* v. *New York Life Insurance Co.*, 304 U. S. 202, 206 [1938]).

The statutory right of redemption of a leasehold, on the statute books since New York, L. 1842, Chap. 240, Sec. 1, has rarely been passed upon by the Court of Appeals of the State of New York in any of its phases and not since *Terwilliger* v. *Browning King & Co.*, 222 N. Y. 47 (1917). The right of a redeeming party under a leasehold therefore cannot be said to be of such general importance as to warrant the issuance of a writ of certiorari.

III

The bank's motion which was granted by the Circuit Court of Appeals reversal of the District Court was for an allocation out of the preliminary deposit filed by the Federal Government in the District Court pursuant to tit. 40, U. S. C., Sec. 258a, before trial. The trial of this action is at present proceeding before three Commissioners appointed by the District Court under the applicable State procedure. The Circuit Court of Appeals, while holding that the bank was entitled for its compensation to at least

the value of the unexpired term of the lease, also held that on the state of the record it could not determine whether the bank was also entitled to anything for the building located on the leased land and remanded the matter to the District Court for further hearings.

In *Hamilton Shoe Co.* v. *Wolf Brothers*, supra, this Court said at p. 258:

> "As has been many times declared, this is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision (citing cases). And, except in extraordinary cases, the writ is not issued until final decree."

IV

Under all of these circumstances, a writ of certiorari on procedural grounds should be denied.

POINT II

The bank's inchoate vested right to redeem the leasehold, actually redeemed while the action was pending and before final judgment, was a vested and valuable property right constituting "property" within the meaning of the Fifth Amendment to the Constitution for which just compensation must be made herein.

I

Upon the title vesting on April 1, 1941, all individual property rights in the real estate condemned were extinguished, and the fund deposited in the District Court and any eventual greater amount awarded after trial stood in place of the property condemned. *Duckett & Co.* v. *United States*, 266 U. S. 149, 151 (1924). The New York rule is no different. *Utter* v. *Richmond*, 112 N. Y. 610, 613 (1889). In *Utter* v. *Richmond*, supra, the Court said (p. 613):

> "No doctrine could be more clearly just than that, when land is taken for public use, the damages awarded are to take the place of the land in respect to all the *rights* and interests which were dependent upon and incident to it." (Italics ours.)

On the date title vested in the Federal Government, the City of New York could not have conveyed its property in this case free and clear of the bank's right of redemption since, as *Terwilliger* v. *Browning King & Co.*, 222 N. Y. 47, 55 (1917) makes clear, the landlord's fee title, or so much thereof as is represented by the leasehold, was a defeasible one subject to revesting by the tenant or his mortgagee by redemption. The case holds that the right of redemption gives to the redeeming tenant (Code of Civil Proc. Sec. 2256, now C. P. A. Sec. 1437) or mortgagee or judgment creditor (Code of Civ. Proc. Sec. 2257, now C. P. A. Sec. 1438) a property right in the leased land even after the term has ceased on the dispossess.

As the ownership of the City was a defeasible one, it could not have obtained as much for the property on the date of vesting of title in the open market as it would have obtained did the right of redemption not exist. Nevertheless, the City in this case argues that it is entitled to the full award for Damage Parcel No. 55. There can be no question that if the City of New York had made a contract for the sale of this property just prior to condemnation, free and clear of any and all liens and encumbrances, it would have been unable to convey a free and clear title by reason of the tenant's and the mortgagee's right of redemption, a right to revest itself into possession of the property for many years to come at a fixed rental, and the right to either a renewal of the premises at the end of the term or to have the value of the improvements paid to it. (See *Grill* v. *City of New York*, 282 N. Y. 471 [1940], involving the standard Wallabout Market lease containing the same covenants and conditions as the lease involved herein.)

If the City is to be given the entire award for the parcel even though on a sale of the property it could not have conveyed a free and clear ownership, then the City will receive more than the market value of its rights in the property and the owner of the right of redemption no compensation. Such a conclusion would run counter to the market value test to be used in the valuation of the various rights and interests in real property condemned as enunciated by this Court in *United States ex rel. T. V. A.* v. *Powelson*, supra. Although only $508.41 is owed to the City, it would receive the leasehold award, including the building on the property, worth thousands of dollars, as well as the value of its reversion.

The right of redemption on the date of vesting of title, April 1, 1941, was obviously worth the value of the leasehold including the building leased (owned by the lessee), less the cost of redemption to the holder of the right of redemption. If a leasehold is worth $10,000 and in order to obtain it one must pay $500, then obviously the value of the right is worth $9,500.

No legislation or court decision in view of the Fifth Amendment to the Constitution can hold that as to any vested, irrevocable property right in real property taken, that if the right has value, that no compenstaion may be allowed. The right of redemption given to a lessee or his mortgagee or judgment creditor by the Civil Practice Act, Secs. 1437 and 1438, inheres in every lease and mortgage of a lease under the law of New York where the lease has more than five years of the term unexpired, unless the parties waive the right. The statute enters into the contract by implication of its terms and is just as much a part of the contract as if the right to redeem had been specifically set forth therein. Such right of redemption contained in the contract is a vested property right and the Legislature would be powerless to wipe it out with respect to the existing contract. *Coombes* v. *Getz*, 285 U. S. 434, 442 (1932).

Just as legislation could not have wiped out the bank's statutory right of redemption which formed part of its contract with Hudes Bros., its mortgagors, so too would the Legislature have been powerless to wipe out the claimant's right to just compensation previously vested. *Ettor* v. *City of Tacoma,* 228 U. S. 148, 156 (1913). The condemnation proceeding itself could not have wiped out the vested property right in the leased premises without just compensation. *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 327 (1893).

II

Nothing in the statutes, both State and Federal, applicable to the acquisition of private property for public use by the Federal Government within the confines of the State of New York restricts or can restrict from a constitutional viewpoint the right of any person whose property has been acquired, whatever the nature of the vested property right, to have his compensation judicially determined, and if it has value, to be paid for it. Accordingly, it has been held that not only is the owner of a fee simple absolute entitled to just compensation but also a mortgagee (*Hudson River Regulating Dist.* v. *Fonda, etc., R. Co.,* 249 N. Y. 445 [1928]), a lessee (*Matter of City of New York* [*Delancey Street*], 120 App. Div. 700, 706 [1907]; *People* v. *Thornton,* 122 App. Div. 287 [1907]), a judgment creditor (*Van Loan* v. *City of New York,* 105 App. Div. 572 [1905]), the holder of a right of redemption under a tax statute (*Matter of Sheldon,* 113 Misc. 733 [1912]), a wife's inchoate right of dower, which is not an interest or estate in lands (*In re New York and Brooklyn Bridge,* 143 N. Y. 640 [1894], aff'g 75 Hun 558, 561 [1899]; *Matter of City of New York* [*Cropsey Avenue*], 268 N. Y. 183, 186 [1935]), the holder of a franchise (*Eighth Avenue Coach Corp.* v. *City of New York,* 286 N. Y. 84, 96 [1941]; *Monongahela Navigation Co.* v. *United States,* supra), the holder of a contract of sale for the purchase of real property (*Reife* v. *Osmers,* 252 N. Y.

320, 322 [1929]; *Clarke* v. *Long Island Realty Co.*, 126 App. Div. 282 [1908]), the holder of a tax lien (*Matter of City of New York* [*Houghton Ave.*], 266 N. Y. 26, 29 [1934]), the right of renewal appurtenant to a lease (*Matter of City of New York* [*North River Waterfront*], 118 App. Div. 865, 867 [1907], aff'd 189 N. Y. 508 [1907]; *Matter of William and Anthony Streets*, 19 Wend. [N. Y.] 678, 685 [1839]), the heirs of the grantor of a fee simple subject to a condition subsequent after breach of the condition but before common law re-entry, a mere chose in action (*Matter of City of New York* [*North Conduit Avenue*], 262 App. Div. 70 [1941]), the heirs at law of a grantor of a fee simple determinable when condemnation occurs shortly before the limiting event is to occur (*United States* v. *2184.81 acres of land in Sebastian, etc., Counties, Ark.* [D. C., W. D. Ark.], 45 F. Supp. 681 [1942]), and the holder of an inchoate vested privilege to acquire title *in futuro* by filling in the lands which are the subject of the privilege (*First Construction Corp.* v. *State of New York*, 221 N. Y. 295, 315-317 [1917]).

Any person who comes within the definition laid down by the above authorities, Sections 258 and 258a of title 40 of the United States Code and Section 2 of the New York State Condemnation Law is "an owner" and a proper and necessary party to the action.

In Section 2 of the Condemnation Law the term "real property" is defined as "any right, interest or easement therein or appurtenances thereto"; and the term "owner" is defined as "all persons having any estate, interest or easement in the property to be condemned or any lien, charge or incumbrance thereon".

In *Marcellus Electric R. R. Co.* v. *Crisler*, 33 Misc. 1, 2 (1900), the word "interest" as used in the old Code of Civil Procedure, Sec. 3358, now Sec. 2 of the Condemnation Law, was held broad enough to cover and was intended to cover an inchoate right of dower which technically is not an estate or interest in real property (*Matter of City*

of New York [*Cropsey Ave.*], supra). In *Bank of Auburn* v. *Roberts*, 44 N. Y. 192 (1870), the Court, construing the word "owners", held it included incumbrancers (p. 202) or otherwise the construction would be improper. In *Matter of Opening of Eleventh Avenue*, 81 N. Y. 436 (1880), at p. 448, the Court held that it was never intended to hold that "the owner of the naked fee was entitled to the whole award notwithstanding that the rights to the beneficial enjoyment of the land was vested in others".

How far the courts have gone in protecting the rights to just compensation is demonstrated by the decision of this Court in the leading case of *Monongahela Navigation Co.* v. *United States*, supra, where it was held that even where Congress had specifically provided in the Act authorizing the acquisition of the property, that nothing should be paid for the franchise of the company which would be destroyed by the taking, that nevertheless the right to just compensation being a judicial question, it was beyond the power of the Legislature to say what property rights should be compensated for and what should not or what the measure of the compensation should be.

The status of "ownership" in a condemnation proceeding is determined at the precise moment when title is taken. *Duckett & Co.* v. *United States*, supra; *Matter of Van Etten* v. *City of New York*, 226 N. Y. 483, 489 (1919). If the estate, interest, lien, charge or incumbrance against the real property was in effect on the date title vested in the condemning party, that person is a proper party to the proceeding. When land is acquired by eminent domain all pre-existing titles, interests, charges, incumbrances and vested property *rights* in the property become extinguished and the award stands as a substitute for the land and all rights are transferred to and attach to the award. *Utter* v. *Richmond*, supra.

The United States courts are required upon an application of this kind to adjust the rights, liens and encumbrances of the various claimants equitably. Tit. 40, U. S

C., Sec. 258a; New York State Condemnation Law, Sec. 22; *Utter* v. *Richmond,* supra; *United States* v. *Certain lands in Borough of Brooklyn,* 129 F. (2d) 577, 578-579 (C. C. A., 2nd Cir., 1942).

On April 1, 1941, the bank had the right to redeem the leasehold on November 25, 1941, if the tenant did not. If the tenant redeemed, the mortgage would be restored. Under the terms of the statute the tenant had until November 24, 1941, some months after the vesting of title, to redeem, and the bank as mortgagee of the leasehold, provided it filed a notice of intention to redeem, prescribed by the statute, prior to that date, which it did, on September 24, 1941, had until the following day, November 25, 1941, up to 2 P. M., to redeem by tendering to the City of New York $508.41, the moneys owing to protect its mortgage in the unpaid amount of $7,680 and interest (R. 7, 10). This it did. This right of redemption was a valuable right and obviously was worth on the date title vested the difference between the value of the leasehold including the building owned by the tenant and the sum of money owed, tendered to the City of New York.

The fact that the bank's right to redemption on the date of vesting of title was inchoate and could not be physically exercised by virtue of the terms of the statute until the day following the expiration of the year during which the tenant might redeem, did not make it a valueless right nor one for which no compensation could be allowed.

Under the law of New York, inchoate rights are not destroyed by a taking but are transferred to the award.

III

The question as to whether or not a claimant is entitled to an award in a condemnation action is not determined by finding out whether or not he has a vested legal "estate" or "interest" in the property in the technical meaning of the terms as defined by the ancient and historic legal concepts, but by whether or not the particular right he enjoys

has a value in the open market. Nomenclature is not the deciding factor. Thus a wife who holds an inchoate right of dower while her husband is still alive is nevertheless entitled to an award in the condemnation action for the value of that right, even though it is not an interest in the land. *Matter of City of New York* (*Cropsey Avenue*), supra. The heirs of the grantor of a fee title conveyed subject to a condition subsequent which has been breached by the grantee or his successors, even though they have not re-entered into possession of the premises or even commenced an ejectment action on the date title vested, are nevertheless entitled to the award in the condemnation proceeding (*Matter of City of New York* [*North Conduit Avenue*], supra), even though they are holders of a mere unassignable chose in action (*Upington* v. *Corrigan*, 151 N. Y. 143, 153 [1896]). On the other hand, where at the time of title vesting in the condemnor there was no likelihood of a reverter occurring, it has been held that the rights of the heir which legally are mere "possibilities" were not entitled to compensation because, and only because, the possibility "possessed no value capable of estimate" (*First Reformed Dutch Church* v. *Croswell*, 210 App. Div. 294, 295 [1924], app. dismissed 239 N. Y. 625 [1925]).

Where at the time of condemnation the likelihood of the event happening upon which a fee simple determinable would revert to the heirs of the grantor was imminent, the Federal District Court in Arkansas held recently that the holders of the right of reverter which is not technically an estate or interest in real property were, nevertheless, entitled to share in the compensation (*United States* v. *2184.81 acres of land in Sebastian, etc., Counties, Arkansas* [D. C., W. D. of Ark.], 45 F. Supp. 681, 684 [1942]).

Professor Powell, of Columbia University, Reporter for the American Law Institute in the Restatement of the Law of Property, Sec. 53, comments a, b, c and d, states that if the occurrence of the revesting of title in the heirs of the grantor in a defeasible fee (which the Restatement [Chap.

4] defines to include a fee simple determinable and a fee simple subject to a condition subsequent) is likely to occur within a reasonably short time, the owner of this right is entitled to share in the compensation (A. L. I., Property, Sec. 53, com. c. *United States* v. *2184.81 acres of land in Sebastian, etc., Counties,* supra). *First Reformed Dutch Church* v. *Croswell,* supra, is in accordance with the Restatement viewpoint as contained in Sec. 53, comment b, where the Reporter states that if the occurrence of the event which would cause the reverter to become effective is not in the immediate foreseeable future, then "under these circumstances the future interest has no ascertainable value" and for that reason alone is not paid for. *Matter of City of New York* (*North Conduit Avenue*), supra, is in accordance with the Restatement viewpoint as contained in comment d of Sec. 53, where the Reporter says:

> "When a condition subsequent attached to an estate in fee simple defeasible has been broken prior to the commencement of the eminent domain proceeding, then the owner of the power of termination has the option to claim and receive the entire awarded damages based on the value of an estate in fee simple absolute in such land."

Under the law of New York, where a breach of a condition subsequent has occurred but no re-entry has been made, the holder of the right of re-entry (or power of termination, as the Restatement puts it) has a mere chose in action, a right to bring ejectment which is unassignable even after breach—"not even a possibility coupled with an interest" (*Upington* v. *Corrigan,* supra, p. 151; *People* v. *Wainwright,* 237 N. Y. 407, 411 [1924]). Nevertheless, under the *North Conduit Avenue* case, supra, the holder of the chose in action who has only an option after title has vested in the condemnation proceeding to claim the award (A. L. I., Property, Sec. 53, com. d; *Upington* v. *Corrigan,* supra, p. 154) is nevertheless entitled to it.

In *Allen* v. *Trustees of Great Neck Free Church*, 240 App. Div. 206, 213 (2nd Dept., 1934), the Court pointed out that the New York case law with respect to titles in fee simple subject to conditions subsequent are in accordance with the Restatement viewpoint.

The reason for setting forth the Restatement viewpoint at such length is to point out the basic rationale for the allowance of compensation to various individuals in a condemnation proceeding. It is unimportant in determining whether a party is entitled to share in an award to determine the legal nature of the right or interest that the party owns as defined in the ancient and historic real estate concepts. The only question is how much is the particular vested right worth. If on the date of condemnation the facts and circumstances are such that a reverter must occur within a few days, for any court to rule that the owner of the fee is entitled to the full award or to the major portion of the award to the exclusion of the grantor's heirs, who technically have only a mere possibility of reverter, or chose in action, would be to ignore the market value test in condemnation proceedings.

Obviously, under the hypothetical fact situation set forth, no one would pay the owner of the fee very much or possibly anything for the fee title, for the real value of the property would be in the holder of the reverter even though said holder at the moment of taking title by the condemnor had no legal or equitable estate or interest in the lands but a mere "possibility" or "chose in action". The rationale of the Reporter is applicable to the facts herein.

In *Terwilliger* v. *Browning King & Co.*, supra, the Court of Appeals of New York, in the course of its opinion, at page 55, held that when the owner dispossesses the tenant who has the right of redemption, the owner's "reversion and revesting are not absolute but defeasible. They are subject to the right of the tenant to redeem, to re-acquire, to become revested with, through the method prescribed in the section, by operation of law, the identical interest

he property which reverted to and revested in the land-
l * * *. Through the redemption the lease is reinstated
the operation of the statute * * *".

f the holder of the right of reverter in a defeasible fee
ple is entitled to compensation in the condemnation
ceedings where the likelihood of reverter is great, is
the holder of the right to redeem a defeasible lease-
d estate similarly entitled to compensation under the
ne circumstances? This is what the Circuit Court of
peals held when it said in its opinion (R. 53):

> "There was enough likelihood of redemption by the bank to give its right value, and that, we think, should be the test of its compensability."

n this case, where the leasehold estate including the
nership of the building is worth unquestionably many
usands of dollars and the amount owing which was
dered amounts to only a few hundred dolars, the real
substantial value in the leasehold award from a market
ndpoint on April 1, 1941, was not in the City of New
rk but in the tenant and the mortgagee. The objection
forth in the *First Reformed Dutch Church* v. *Croswell*,
ra, to payment of the holder of the reverter because
heir's possibility of reverter "possessed no value
able of estimate" is not present here. The fact that a
sibility of reverter is "a mere personal right, and not
nically an estate in the land" (*Southwick* v. *New York*
istian Missionary Society, 151 App. Div. 116, 119 [1912],
d 211 N. Y. 515 [1914]; *People* v. *Wainwright*, supra, p.
) and is a mere chose in action which is not assignable
n after breach (*Upington* v. *Corrigan*, 151 N. Y. 143,
-153) did not prevent the holder of the right of re-entry
Matter of City of New York (*North Conduit Avenue*),
ra, decided in accordance with the Restatement view-
nt (Sec. 53, com. d) from obtaining the entire award.

f the holder of a right of re-entry which has been
ached before title vesting in the condemnor has no estate

or interest in the land but merely a chose in action, then it is obvious that the test of compensability, just as in the case of dower, is not dependent on whether or not the holder of the right has an estate or interest in land in the technical meaning of the term. He is entitled to the award solely because his right, from the market value viewpoint, is the valuable one.

The City in its brief (p. 25), in discussing the *North Conduit Avenue* case, tries to give the impression that the decision was based on the theory that the holder of the right of re-entry had already re-entered. He had not. Under the law of New York, re-entry can be obtained only by an ejectment action (*Towle* v. *Remsen et al.*, 70 N. Y. 303, 313 [1877]; *Southwick* v. *New York Christian Missionary Society*, supra, p. 120), and although eight years had elapsed between the breach of the condition and the condemnation, no ejectment action had been brought.

In *First Construction Co.* v. *State of New York*, 221 N. Y. 295 (1917), the Court of Appeals construed an act of the Legislature to mean that the Legislature had granted the privilege to the claimant in the condemnation proceeding, of filling in and erecting improvements upon the lands which when filled would give a fee title to the grantee of the privilege. The Court held that the mere privilege to fill in, so long as unexercised, did not convey title (p. 315).

Nevertheless, the Court concluded that this privilege which had not been exercised on the date of vesting of title in the State, constituted an inchoate vested privilege, a valuable property right, for which compensation must be allowed. At page 316 the Court said:

> "Reaching the conclusion that these prior acts did not convey title to the lands under water unless filled in it becomes necessary for certain purposes to determine what were the extent and nature of the right granted before it had been exercised. This precise question does not appear to have been definitely settled in this state. In various states it has been held that all that is granted by such an act is a mere license,

revocable by the state at will and without payment of compensation. (N. Y., L. E. & W. R. R. Co. v. Yard, 43 N. J. L. 632, 636; State v. Mayor, 25 N. J. L. 525; Stevens v. Paterson & Newark R. R. Co., 34 N. J. L. 532; People v. Cal. Fish Co., 166 Cal. 576.)

"I think, however, that the privilege amounts to more than this, and that an act granting the right to fill in lands under water, and thereby acquire title to the same, gives an inchoate, vested interest in the lands described which is a property right and of which, unless forfeited or lost in some way, the grantee cannot be deprived without compensation."

t page 317, the Court said:

"It, perhaps, is unnecessary to give a specific name to this right, but if we are to do this, it may as aptly be termed a franchise as anything else."

It is obvious from reading the opinion of the Court of ppeals that the name of the title or interest conveyed the individual was not important in the determination at the claimant had an inchoate vested right for which was entitled to just compensation.

The Court at p. 316 of its opinion quoted above obviously nswers the City's argument in this case with respect to ie right to compensation for a vested privilege when it oints out that if the privilege, even though it be inchoate, vested, then compensation must be allowed. It clearly istinguishes, by discussing decisions in other jurisdictions, etween a privilege which is revocable at will and one which not. No substantial difference can be seen between a tatutory privilege to acquire title *in futuro* by filling in nds under water at a considerable expense and a statutory rivilege or right of redemption to revest oneself with a easehold interest which is an estate in real property *in uturo,* on the payment of a certain sum of money. If ne is compensable the other is likewise. If a chose in ction like a right of re-entry for breach of a condition ubsequent after the breach has occurred is a compensable ight in real property, if it has value, even though it is not

an estate or interest and is unassignable, then also a statutory right of redemption which is written into the leasehold contract and mortgage is also a valuable property right for which just compensation must be made.

If we examine the Restatement of the Law of Property, comments, cited supra, and the cases providing for a distribution of awards in a condemnation proceeding (supra, pp. 10, 11) and ask which interest was the substantial financial interest in the property and equitably entitled to the award therefor, we find in each instance why the party received the award or part of the award in the condemnation proceeding to the exclusion of his adversary.

If on the day before title vested in the United States, March 31, 1941, the tenant had tendered the amount owing to the City of New York, there can be no question that the tenant would have been entitled to the award for the leasehold in this action (C. P. A. Sec. 1437; *Terwilliger* v. *Browning King & Co.*, supra). The vesting of title in the Federal Government on April 1, 1941, could neither wipe out the tenants' nor their mortgagee's statutory right to redeem during the statutory period, without compensation, since such right is an inchoate vested property right and had a value on that date. All that the vesting of title did was to transfer the rights of the parties in the real property to the award (*Utter* v. *Richmond, supra; Duckett & Co.* v. *United States*, supra).

IV

The City argues (pp. 17, 18 of its brief) from the decision in *Pell* v. *Ulmar*, 18 N. Y. 139 (1858), a case involving a statutory right to redeem after foreclosure, that the right of redemption is in the nature of "a special and limited privilege which gives a mortgagee the option of succeeding to the lessee's rights and liabilities". But this was likewise true of the cases just discussed.

The City cites cases for the proposition that such a right of redemption is not technically an estate or interest in land

and that (p. 19 of its brief) it does not have many of the attributes of property, citing many decisions in jurisdictions other than New York. None of these cases are in point and for several reasons. Firstly, whether or not the bank is entitled to compensation in this proceeding is dependent upon whether or not on the date of vesting of title in the Federal Government it had a property right in the real estate condemned, under the laws of New York. Under the applicable decisions of this Court that question must be determined under the New York law (*Loundes* v. *Huntington*, supra; *Beauregard* v. *City of New Orleans*, supra; *United States ex rel. T. V. A.* v. *Powelson*, supra). Secondly, many rights in real property which are of a special and limited nature do not have many of the attributes of an estate in real property but nevertheless have been held compensable in a condemnation proceeding under the law of New York (*First Construction Corp.* v. *State*, supra; *Matter of City of New York* [*North Conduit Avenue*], supra; *Matter of City of New York* [*Cropsey Ave.*], supra; *Matter of William and Anthony Streets*, supra; A. L. I., Property, Sec. 53, com. a-d). Deciding the nature of the title of a holder of a right of re-entry by the applicable New York decisions, it is readily seen that his right to compensation is not dependent on the facts cited by the City in its brief (pp. 18 and 19). The following inchoate rights are not estates or interests in land: dower (*Matter of City of New York* [*Cropsey Ave.*], supra), right of renewal of lease (*Matter of William and Anthony Streets*, supra), right of re-entry for breach of condition subsequent (*Upington* v. *Corrigan*, supra; *People* v. *Wainwright*, supra; *Calvary Presb. Church of Putnam*, 249 N. Y. 111, 115 [1928]).

In *People* v. *Wainwright*, supra, at p. 411, the Court said:

> "The right to take advantage of a condition subsequent is neither an estate nor an interest in real property, nor is it at common law an assignable chose in action" (p. 411).

In the last cited case the Court in discussing *First Construction Co.* v. *State of New York,* 221 N. Y. 295, cited supra, said at page 412:

> "In First Const. Co. of Brooklyn v. State of New York (221 N. Y. 295), on which the decision of the Appellate Division largely rests, no grant of lands under water was involved. The state retained all its right, title and interest in the lands affected, except that it granted a privilege, somewhat in the nature of a franchise, over such lands, to fill in and erect a bulkhead, which grant was held to be of value to the grantee. The question in the case was as to the nature of the grantee's interest only."

The New York cases clearly indicate that even though a right of re-entry for breach of a condition subsequent is neither an estate nor an interest in real property, is not assignable either before or after the breach of the condition, nevertheless where the breach has already occurred the holder of this unassignable chose in action is entitled to compensation. Similarly, lack of assignability of a lease without the landlord's consent is not a bar to compensation for the tenant's leasehold (*Wrenn* v. *Smith,* 41 Fed [2d] 972 [C. C. A., Dist. of Columbia, 1930]).

It is interesting to note in connection with the decision in *Matter of City of New York* (*North Canduit Avenue*), supra, that the breach of the condition subsequent had occurred in 1926, eight years before the condemnation title vested in the City of New York in 1934. During that period the heirs of the grantor had never brought an action in ejectment to re-enter the premises although they had the legal right to do so. Nevertheless, in accordance with the Restatement of Law of Property viewpoint, Sec. 53, com. d, the holder of this right, which was not an estate or interest in land until re-entry (or, in other words, the conclusion of an ejectment action), was nevertheless entitled to the award. The value of the right is the test of compensability.

The City in its brief has missed this point completely, ut the Appellate Division, Third Department, in *First Reformed Dutch Church* v. *Croswell*, supra, did not miss he point at all, for it said (p. 295):

> "These rights possessed no value capable of estimate. All that was valuable was the estate of the plaintiff. Therefore the money paid by the City of New York should be paid to the plaintiff *as for the only thing of value taken.*" (Italics ours.)

The City's argument (p. 24 of its brief) that the right f reverter was an interest in land is answered by the ases cited supra. The Appellate Division in the *First Reformed Dutch Church* case, while it agreed that the ight of reverter was a mere possibility, did not base its ecision on that fact. The decision of the Court is clearly n accordance with the Restatement viewpoint. If the ight has a value it is to be paid for. If it has no value r the value of the right is incapable of estimate, no compensation is to be paid for the taking of the reverter.

V

The City cites (p. 21 of its brief) the recent decision of his Court, *United States ex rel. Tennessee Valley Authority* v. *Powelson*, 319 U. S. 266 (1943), as authority in its avor. There the claimant contended that in determining he value of the property it was proper for the Court to onsider the claimant's right to acquire the adjoining nds under the power of eminent domain granted it by the State of North Carolina. This Court held that such a ight was not a compensable property right within the neaning of the Fifth Amendment. The decision is perectly consistent with and in fact supports the respondent's iewpoint. At page 276 of its opinion this Court said:

> "The grant of the power of eminent domain is a mere *revocable privilege* for which a state cannot be required to make compensation." (Italics ours.)

This Court cited among other cases *Adirondack Railway Co.* v. *New York*, 176 U. S. 335 (1900), and *Ramapo Water Co.* v. *New York*, 236 U. S. 579 (1915), both cases involving New York condemnation proceedings.

At page 280 the Court said:

> "It is 'private property' which the Fifth Amendment declares shall not be taken for public use without just compensation. The power of eminent domain can hardly be said to fall in that category. *It is not a personal privilege;* it is a special authority impressed with a public character and to be utilized for a public end (citing cases)." (Italics ours.)

From this the Court concluded that the unexercised power of eminent domain did not constitute a property right "which rises to the estate of 'private property' within the meaning of the Fifth Amendment" (p. 281). But the right of redemption and possibility of reverter are personal privileges (*Southwick* v. *New York Christian Missionary Society*, 151 App. Div. 116, 119).

As this Court indicated in the *Powelson* case, citing New York cases as authority, the right to exercise the power of eminent domain is a revocable privilege which under New York law cannot be compensated for in a condemnation proceeding. That no compensation may be made for a revocable privilege has been indicated in other New York cases such as *Kingsland* v. *Mayor etc. of New York*, 110 N. Y. 569 [1888], and *Matter of City of New York* (*Emmons Avenue*), 254 App. Div. 690 [1938]. As the Court said in the Emmons Avenue case "in any event, even if the permit be deemed to have been lawfully issued, it was by its terms revocable at will with or without reason. Such a permit does not constitute a *property right, privilege,* franchise, interest or easement which is taken in these proceedings." (Italics ours.) It should be noted that the Court inferentially ruled that certain privileges or property rights are, however, compensable. The nub of the City's

confusion in its citation of *United States ex rel. T. V. A.* v. *Powelson,* supra, is contained in the fact that it fails to distinguish between a privilege or permit which is revocable at will and hence a mere gratuity and an inchoate vested, irrevocable right or privilege.

See *People* v. *Wainwright,* 237 N. Y. 407 (1924), at p. 412, construing *First Construction Co.* v. *State of New York,* quoted supra, page 22 of this brief.

There can be no question that the statutory right of redemption, while perhaps inchoate before it is exercised, is a vested property right which enters into the mortgage, contract and the lease by implication of its terms (see *Coombes* v. *Getz,* supra).

VI

The City's citation of *Wissmath Packing Co.* v. *Mississippi River Power Co.,* 179 Iowa 1309, 162 N. W. 846 (1917), for the proposition that a statutory right to redeem is not compensable in a condemnation proceeding because it is not an estate or interest in land, is first of all not controlling on the question of title to New York real property. Under the decisions of this Court, in this condemnation proceeding the New York law is controlling (*United States ex rel. T. V. A.* v. *Powelson,* supra). However, the case is nevertheless in favor of the respondent.

In that case, by Act of Congress the power company had been given the power to erect a dam across the Mississippi River and in connection with the power to build the dam it was provided that damages, including those consequential in character, should be paid the owners of the properties injured by the building of the dam. During the construction of the dam, for a period of a few weeks, the building formerly owned by the claimant had been flooded by reason of the construction of the dam. Under the particular statute such temporary damages were compensable. Prior to the injury the property had been sold on execution after foreclosure. Under the Iowa Code, Sec. 4065

(1897), it was provided that the purchaser at the sale was entitled to all accrued damages during the year period between the sale and the termination of the redemption period, but these damages were only collectible under the terms of the statute after the purchaser had acquired an undefeasible fee. The substance of the claimant's claim for injuries brought after the redemption period expired was that but for the flooding of the property he would have been able to interest a certain individual, Schoper, in financing the redemption of the property and that therefore because of the injuries suffered he had been unable to redeem the property. His claim was in substance for this frustration of his opportunity to borrow money with which to redeem.

The Court pointed out that the mortgagor had not redeemed within the year period prescribed by the statute, but the Court said (p. 1325):

> "If he does redeem, then both the land and the claim for intervening damages continue to be his."

In other words, in substance the claimant's claim for damages was in essence, first, not for the value of the right of redemption as claimed by the City in its brief, but was for interference with a contract with another individual which might have enabled him to redeem the property. In the *Wissmath Packing Co.* case, supra, the period of redemption had expired without action on the part of the holder of the right to redeem. Under the Iowa Code, even though condemnation and the injury for which compensation was claimed occurred during the one-year period of redemption (as in the case at bar), neither party was entitled to claim the damages in the condemnation until after the expiration of the year when whoever was then the legal owner of the property, whether the redeeming mortgagor or the purchaser at the sale, would have been entitled to the award. Not having redeemed the company was remediless. This conclusion is no different from that

of the Court in its opinion below and in an earlier decision of the same Court in *United States of America* v. *Certain Lands in the Town of Hempstead* (*County of Nassau* v. *Kramer*), *et al.*, 129 F. (2d) 918 (1942), where the Circuit Court of Appeals for the Second Circuit held that the failure to redeem (the redemption period having expired) wiped out the claim for compensation.

As the Circuit Court of Appeals said below in its opinion (R. 53):

> "On this premise no reason is apparent why the Bank's right to redeem should not be exercised after title vested in order to perfect its right to share in the compensation award which as we said in the case last cited, stands as a substitute for the land."

In the *Wissmath Packing Co.* case the first headnote (p. 1310) reads in part as follows:

> "It follows further that when the injury occurs *after* foreclosure sale and *before* the expiration of the period of redemption, the damages resulting are wholly lost to the mortgagor *who fails to redeem*. Section 4065, Code, 1897." (Italics the reporter's.)

This conclusion is in accord with the ruling below holding respondent could redeem during the redemption period and after the taking of the property. The Court's conclusion below that "there was enough likelihood by the Bank to give its right value, and that, we think, should be the test of its compensability" is in line with the Restatement of the Law of Property viewpoint and is not in conflict with either its previous decision in the *Kramer* case, supra, or with the *Wissmath Packing Co.* case cited by the City. Had the claimants in the last two cases redeemed—even after the right to compensation accrued—they would have been entitled to the awards under the decisions.

In *Matter of City of New York* (*North Conduit Avenue*), supra, on the date title vested the successful claimant to the award had not as yet re-entered although its right to

re-enter had accrued eight years before. Nevertheless, after title vesting it perfected its right to the award, not by re-entry which was no longer possible, but by appearing in the condemnation proceeding and claiming the award. The value of the chose in action represented the full market value of the property and the value of the fee was nil. The City's attempted explanation of the case (City brief, p. 25) is erroneous. There had been no re-entry.

POINT III

The City's attempts to explain and distinguish several of the cases cited by the Circuit Court of Appeals in its opinion are erroneous.

The City's contention that a wife's inchoate right of dower (*Matter of City of New York* [*Cropsey Avenue*]), supra, is in a class by itself in condemnation proceedings is erroneous. As the Court of Appeals said in the cited case, the inchoate right of dower is one of the most "*widely cherished property rights resulting from marriage*". As we have already seen, the inchoate right of dower has been held to be within the meaning of the word "interest" as defined in Section 2 of the New York Condemnation Law (*Marcellus Electric R. R. Co.* v. *Crisler*, supra), although, of course, it is not technically an interest in the land (*Matter of City of New York* [*Cropsey Avenue*], supra). A wife's inchoate right of dower is certainly an "incumbrance" or "charge" on the real property within the meaning of the section, for if the wife does not join in the deed her husband cannot convey a marketable title. So, too, here in the case of the right of redemption on April 1, 1941, the City could not have conveyed a free and clear marketable title because of the outstanding right of redemption. The language in Section 2 of the Condemnation Law defining the owner as "all persons having an estate, interest or easement in the property to be taken, or any lien,

harge or incumbrance thereon" was obviously intended o include any and all possible property rights in the real roperty condemned of any nature, kind or description nd if it did not the statute would be unconstitutional ecause the Legislature could not take away the right to ompensation of any individual having a property right n the land condemned by limiting the parties defendant to particular, limited group (*Monongahela Navigation Co.* v. *nited States*, supra). Who is entitled to compensation is judicial question.

The City's contention that *Matter of City of New York (North River Waterfront)*, supra, is not a holding for the roposition cited by the Circuit Court of Appeals, to wit, hat a right of renewal must be paid for, is erroneous. Although that was the only case cited by the Circuit Court f Appeals on that point it could also have cited the ecision of the Court of Errors and Appeals in *Matter of William & Anthony Streets*, 19 Wend. N. Y. 678, 685 1839), the earliest leading condemnation case in New York here the Court held specifically that the right of renewal ad to be paid for in the condemnation proceeding. The ourt said:

> "Upon the same principles, the stipulations of the landlord must affect the relative interests of the parties. If the lease for the original term is beneficial to the tenant, the unqualified right of renewal for a further period on the same terms, must increase the value of the tenant's interest in the property while it diminishes the value of the reversion."

The Court held (p. 685) that the right of renewal, while ot a legal estate, was enforceable in equity and hence ompensable (p. 685). There can be no question if the ight of renewal is valuable to the tenant he should be ompensated for it. Otherwise the landlord receives the ward for something he has contracted away.

The City errs when it contends that the Circuit Court of ppeals erred when it said that *Matter of City of New*

York (*North River Waterfront*), supra, was not in conflict with *Matter of City of New York* (*Upper New York Bay*), 246 N. Y. 1 (1927), cert. den. *sub nom., Greater New York Dock & Warehouse Co.* v. *Stapleton Dock & Warehouse Corp.*, 276 U. S. 626 (1928). In that case the lease which contained the option to purchase contained a condemnation clause terminating the lease in the event of condemnation. Under the law of New York, when a lease contains such a clause terminating the lease on the date of vesting of title, since there is no longer any unexpired term which can be valued on behalf of the tenant, the tenant loses his right to leasehold damages (see *Matter of Mayor etc. of New York* [*Pier 39, East River*], 168 N. Y. 254, 257 [1901]). The Court of Appeals in the *Upper New York Bay* case accordingly held that inasmuch as the tenant had not exercised its option to purchase contained in the lease prior to the vesting of title, the right to exercise it was destroyed by the operation of the clause in the lease which terminated the lease upon the happening of the condemnation taking. Viewed in this light, this Court will note that the Court of Appeals did not say the option was valueless in and by itself, but rather that it was terminated by the terms of the lease upon the taking of title by the City and that hence there was no option left to evaluate in the condemnation proceeding. In the course of its opinion (p. 33) the Court said:

> "If the tenant had an option to renew the lease instead of to purchase, this certainly under *Matter of Mayor etc. of New York* (168 N. Y. 254) would terminate under this clause. Why should not the option to buy terminate as well as the option to extend the term?"

The Court's conclusion that the option to purchase was in the same category as the option to renew the lease is important because, as we have seen, the cases hold that an option to renew a lease is to be compensated for where there is no condemnation clause (*Matter of William &*

Anthony Streets, supra; *Matter of City of New York [North River Waterfront]*, supra). The Court of Appeals in the *Upper New York Bay* case, continuing its opinion, said (p. 33):

> "Such a thing cannot be; it is not only unreasonable, but not within the terms and conditions of the lease itself. That provides that in the event of the city of New York taking the premises under the right of eminent domain, the lease shall cease and come to an end. *This terminates the option as well as the lease.*" (Italics ours.)

It is clear that the Court of Appeals has included the option to purchase and the option to renew contained in a lease in the same category. Both options are protected in the absence of a condemnation clause terminating the lease and both are destroyed when such a clause is present.

The City's citation in its brief (p. 27) of the condemnation statute under which the *Upper New York Bay* case was tried, former Greater New York Charter, Laws 1901, Chap. 466, as amended, Sec. 979, which provided that upon the vesting of title "all the covenants, contracts and engagements between landlord and tenant *or any other contracting parties* respecting the same [the lands to be acquired] or any part thereof shall * * * cease and determine and be absolutely discharged" (Italics ours) as authority for the proposition that all leases, including options contained therein, terminate upon condemnation "even in the absence of such a provision in the lease", is, to take the charitable view, the result of a complete lack of understanding of the New York law. The provision in the statute was merely designed to accomplish the same purpose as Section 258a of tit. 40 of the United States Code, that is, to give the condemning party a clear title, free and clear of any and all liens, encumbrances and contracts affecting the property condemned in whole or in part and transfer the parties' rights to the awards (*Duckett & Co. v. United States*, supra). The statute was not intended nor could it have accom-

plished the purpose of wiping out any claim for compensation on the part of a lessee or a mortgagee or any other party contracting with reference to the property in lieu of the rights in the property destroyed by the taking (*Duckett & Co.* v. *United States*, supra). There is a vast difference between the meaning of the statutory clause in the New York Charter and the clause terminating the lease in the event of condemnation *made by landlord and tenant in a written lease.*

In *Irving Trust Co.* v. *Hughes*, 239 App. Div. 74 (1933), the Appellate Division, construing Section 1439 of the Greater New York Charter, later Section 979 of the Greater New York Charter, held that with respect to a mortgagee's interest in the property that by virtue of the terms of the statute the mortgage ceases to exist, but further held that under the authority of cases like *Utter* v. *Richmond*, cited supra, that (p. 76):

> "* * * the fund in the hands of the city, to the amount necessary, namely, $30,000, took the place of the land as security for the debt due plaintiff, and that the relations between the plaintiff and the defendant Dunn, the owner, as mortgagor and mortgagee were terminated to the extent that, of course, no foreclosure could take place, as no lien or mortgage survived and as the land had already been reduced to money. The city obtains the property free and clear of all liens. All persons having an interest in the property including mortgagees who assert their rights in the condemnation proceeding have the value of their claim fixed as of the date of the taking. * * * What is left to the mortgagor and the mortgagee is the obligation of the City of New York to pay the value of their respective interests in the property."

The rationale of the decision is obviously applicable to the leasehold case. In the ordinary case, where there is no condemnation clause wiping out the tenant's claim for leasehold damages, the statutory language merely gives to the City a full, free and clear fee, but does not and cannot

deprive the claimant of his claim for leasehold damages any more than it could deprive the mortgagee of his. That this is so is evidenced by the fact that many, many awards have been made for leasehold damages in New York despite the provisions of the statute (see *Matter of City of New York* [*Delancey Street*], supra; *Matter of Starr Street in Borough of Queens*, 73 Misc. 380, 387 [1911], aff'd *sub nom. Matter of City of New York* [*Starr Street*], 163 App. Div. 917 [1914], aff'd 212 N. Y. 606 [1914]; *Matter of City of New York* [*Seventh Avenue*], 196 App. Div. 451, 457 [1921]). All of these cited cases, and many, many more, were tried under the Greater New York Charter provision. Under these cases a tenant is entitled, in the absence of a condemnation clause, to have the value of his leasehold determined which is measured by the difference between the rental reserved in the lease and the rental value of the premises for the unexpired term of the lease. The reason why the option to purchase was destroyed in *Matter of City of New York* (*Upper New York Bay*), supra, was not because of the statute but by reason of the fact that since the conditional limitation in the lease, terminating the lease on condemnation, wiped out the unexpired term, there was no term remaining in favor of the tenant which could be valued—the measure of leasehold damages being the value of the unexpired term. With the termination of the lease by the parties (not by the statute) the option to purchase was wiped out in the *Upper New York Bay* case.

As this Court said in *Duckett & Co.* v. *United States*, 266 U. S. 149 (1924), in holding that under the statute the taking extinguished all rights vested in the tenant (p. 151):

> "In such a case we no more should expect to hear it argued that the leaseholds were not to be paid for than that the former fee simple should not be, on the ground that it was gone and a new fee begun."

POINT IV

The City's contention that it is entitled to the entire award for Damage Parcel 55, is not in accord with the "fair market value" test.

Although in March, 1941, in order to protect its mortgage in the unpaid amount of $7,650 and interest, the bank offered to pay the City the amount owed by the tenant, namely, $508.41 (the bank not having been made a party to the dispossess proceeding), the City refused to take the monies owing to it because it wanted to keep the property and try to deprive the respondent of its rights. As events turned out, the bank's immediate attempt thereafter to be impleaded into the dispossess proceeding could not procedurally succeed. When on September 24, 1941 the Appellate Division, Second Department, denied the bank leave to appeal, on the following day, the bank protected its rights by serving the statutory notice of intention to redeem as prescribed by C. P. A., Sec. 1438, and thereafter on November 25, 1941 tendered the sum of $508.41 owed to the City on the redemption.

The City inequitably claims in this case that it is entitled to the entire full fee award for Damage Parcel No. 55 in this action although from the market value standpoint it is not entitled to the entire award, for on April 1, 1941 it could not have conveyed a free and clear title. On April 1, 1941 it could only have conveyed title subject to the tenant's and the bank's right of redemption, yet it is now claiming that the market value of its rights in the property on April 1, 1941 was the full fee value. This it cannot do, for on April 1, 1941 it did not own the full and complete fee in Damage Parcel No. 55. Its title was defeasible (*Terwilliger* v. *Browning, King & Co.*, supra), and under the cases and under the Restatement of Law of Property, Sec. 53, com. a, b, c and d, while the condemnor must pay the full market value of the property taken, the

award in the case of a defeasible ownership must be divided between the parties interested. The holder of the right of re-entry or the right of redemption is such a party where the right has value. Under the facts in this case there can be no question that the Circuit Court of Appeals was correct when it *factually* held in its opinion (R. 53):

> "There was enough likelihood of redemption by the Bank to give its right value, and that, we think, should be the test of its compensability."

The Court continued, saying (R. 53):

> "The vesting of title in the United States should not defeat the right to redeem, since condemnation should affect the rights of parties having interests in respect to the land taken only so far as necessary to insure the sovereign's title (citing case)."

The Circuit Court of Appeals' conclusion is obviously correct and equitable (R. 53):

> "On this premise no reason is apparent why the Bank's right to redeem should not be exercised after title vested in order to perfect its right to share in the compensation award, which, as we said in the case last cited, stands as a substitute for the land."

CONCLUSION

The petition for certiorari should be denied, with costs.

New York, April 14, 1944.

Respectfully submitted,

Bernard L. Bermant,
Counsel for the Respondent, The National City Bank of New York,
270 Broadway,
New York 7, N. Y.